IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

THURSDAY, THE 11TH OCTOBER 2007 / 19TH ASWINA 1929

CRL.A.No. 811 of 2003()

SC.34/2003 of ADDL.SESSIONS COURT (ADHOC-I), KASARAGOD

.....

APPELLANT: 2ND ACCUSED:

SUDHAKARA SHETTY, S/O.NARAYANA SHETTY,
MEEYAPPADAVU MANE, KULAVAYAL, MOODAMBAYAL VILLAGE.

BY ADV. SRI.M.RAMESH CHANDER
SRI.V.TEKCHAND

RESPONDENTS: COMPLAINANT:

---

1. STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

2. STATION HOUSE OFFICER,
MANJESHWAR POLICE STATION.

BY P.P.SRI.THOMAS JOHN AMBOOKKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
ON 11/10/2007, ALONG WITH CRL.A.NO.812/03, THE COURT ON THE
SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

CRL.A.NOS.811 & 812 OF 2003

Dated this the 11th day of October, 2007.

JUDGMENT

These appeals are filed by the 2nd and 1st accused respectively in S.C.No.34/2003 on the file of the Additional Sessions Judge (Adhoc-I), Kasaragod. The appellants faced trial for an offence punishable under Section 55(a) of the Abkari Act on the allegation that they were found in possession of 1532 bottles of Boss Whisky and 1344 bottles of Rummy Coconut Fenny, Indian made foreign liquors, at the property belongs to one A.K.Khalid, Chakkutal in Thalakkala village within the limits of Manjeshwar Police Station on 3.12.2000 at about 7.20 p.m against the provisions of the Abkari Act and thereby committed the offence alleged.

2. Prosecution examined five witnesses and relied on Exts.P1 to P6. After closing the evidence adduced by the prosecution, while questioning the appellants under Section 313 of the Code of Criminal procedure, the appellants have stated that they are innocent of the charge and the case was foisted against them by using certain abandoned bottles of foreign liquor. The 1st accused had further

stated that he is not a person mentioned in Ext.P2 mahazar as Sudhakara Shetty. Ext.D1 ration card No.2468005977 issued in the name of one Narayana Shetty, in which name of Sudhakara Shetty is also included in the house name of Meeyappadavu. Exts.P1 to P6 were also produced. No material object has been produced before the court. The trial court by the impugned judgment, found the appellants guilty and sentenced them to undergo R.I for four years each and to pay a fine of Rs.One lakh each with default sentence of payment of fine, to undergo R.I for six months each. The above judgment is assailed in these appeals.

3. The learned counsel appearing for the appellants raised the following contentions in challenging the judgment of the trial court. Firstly, it is contended that the trial court had not appreciated the evidence properly while finding the appellants guilty of the charge as there is no legally acceptable evidence before the court to prove that the appellants were found in possession of the alleged contraband articles at the time and place as stated by the prosecution. Secondly, it is contended that PW2, the Sub Inspector of Police, had violated the provisions of the Abkari Act and the Kerala Excise Manual while seizing the contraband article and taking the

samples and also producing both the contraband articles and the samples alleged to have been taken at the time of detection of the crime before the court. Thirdly, the trial court had not followed the procedure for the trial of an abkari offence as the court had not verified any of the records relating to seizure of the contraband articles and samples alleged to have been seized and also the alleged recovery of currency notes of Rs.9,000 and odd from the pocket of the 1st accused, the appellant in Crl.A.No.812/2003 as the judgment of the trial court does not show production of any material before the court either seized or produced before the trial court. Lastly, it is contended that the trial court had not considered the case set up by the appellants when they were questioned under Section 313 of the Code as the case is foisted against them with some abandoned bottles of Indian made foreign liquor.

4. To answer the contentions raised, this Court has to look into the evidence adduced by the prosecution first. The prosecution case as is revealed from the evidence of PW2 - the detecting officer, the Sub Inspector of Police, Kasaragod is that while this witness was at the police station on 3.12.2000 at about 6.45 p.m, he had got information that at a place named Chakkuttal in Thalakkala village,

near the house of one Abdul Rahman, sale of liquor was going on at the bushes. This information was received by him through telephone. On getting that telephone information, the Sub inspector and other four police officers went at the place along with one Ronald and one Vadera as witnesses and when they reached at a distance of 300 meters from the place of occurrence and they walked to the bushes and when they reached near the place, they have seen two persons coming towards them each of them having a bundle (chumadu) on their head and when the above persons saw the police officers, they tried to escape from the scene putting the bundles on the ground. However, one of the above persons was stopped and questioned (1st accused) and at about 7.30 p.m, the said person was arrested and identified as the 1st accused. Further, it was understood from him that the person left the place is Sudhakara Shetty and on further verification of the two boxes, it was seen that there were 48 bottles of Boss Whisky each containing 180 ml. Further, on questioning the 1st accused, he had stated that some more bottles were kept in the bushes and he had showed 32 cardboard boxes each containing 48 bottles of Rummy Coconut Fenny and the above cardboard boxes were also seized. Thus, a total of 2,976 bottles of Indian made foreign liquor had been seized and

an amount of Rs.9,500/= was also seized from the pocket of the 1st accused and this witness had further stated that two bottles of Whisky and Fenny were taken for chemical examination. Further, this witness has stated that the 1st accused was produced before the court along with the contraband articles seized. The evidence of Pws 4 and 5, the Additional Sub Inspectors of Police, who continued further investigation of the case would show that scene mahazar of the place of incident has been drawn up and got attested by PW3. The evidence of PW5 would further show that two of the sample bottles seized from the place of incident had been sent for chemical analysis as per the forwarding note dated 4.12.2000. Further, this witness has stated that the samples were got analysed and as per Ext.P6 chemical report, it was reported that the sample analysed contained 41.10 and 41.20% of ethyl alcohol by volume. PW1 was examined to prove the certificate of ownership of the property from where the contraband articles alleged to have been seized and as per Ext.P1 certificate, the property belongs to One A.K Khalid, S/o. K.A. Abudl Kareem, Pulikunnu, Kasaragod. With the above evidence, the trial court found that the prosecution is succeeded in proving that the appellants were found in possession of 1532 bottles of Boss Whisky and 1344 bottles of Rummy Coconut

Fenny, Indian made foreign liquors.

5. The question to be considered in these appeals in the light of the contentions raised by the counsel appearing for the appellants is that whether the trial court is justified in finding that the appellants have committed an offence punishable under Section 55 (a) read with Section 55(i) of the Abkari Act or not.

6. Firstly, from the evidence of PW2, the Sub Inspector of Police, it could be seen that on getting a telephone message that large scale selling of foreign liquor was going on at the bushes near the house of one Abdul Rahman at Thalakkala village, he along with the other police officers went to the place of occurrence in a police jeep and when they reached at a distance of 300 meters from the place of occurrence, they stopped the jeep and walked up to a distance of 300 meters from the place and when they went to the place, they heard talk of two persons and when they reached at a distance of 20 meters, the police officers have seen that two persons are coming towards them with two bundles on their head. This witness has further stated that the police and witnesses had seen the persons coming with the bundles on their head with the aid of a

torch and also at the aid of moonlight. This witness has further stated that when the police party reached close to the two persons, both the persons put their bundle on the ground and tried to escape from the scene. However, one of the person was stopped and questioned and he had stated that the person went out of the place was Sudhakara Shetty, S/o. Narayana Shetty and the name of the person who stood there is Damodaran, the 1st accused. Further this witness has stated that on verification of the bundles stopped by the persons, it was seen that the bundles contained 32 cardboard boxes each contained 48 bottles of Boss whisky with a label for sale only in Karnataka. This witness has further stated that on questioning the 1st accused, he had revealed that some more bottles were kept in the bushes and on further verification as stated by the 1st accused, it was noted that 32 and 28 cardboard boxes are there each having 48 bottles of Fenny and further this witness stated that all the boxes were seized and four bottles each Whisky and Fenny were taken for sample. This witness further stated that an amount of Rs.9,500/= was also recovered from the pocket of the 1st accused. But, this witness further stated in the evidence before the court that on preparing Ext.P2 seizure mahazar, the entire bottles of Whisky and Fenny seized and the mahazar were got

signed by two independent witnesses and one Gosidy. This witness has further stated that all the entire bottles were taken to the police station in a tempo van and kept in the police station and registered the case against the appellants. In the cross examination, this witness has stated that the place of occurrence is a private property and it is a bushy place rather forest like area and when they reached at a distance of 300 meters from the place of occurrence, they heard talking of the accused at the place and they had seen the accused with the aid of a torch and also the moonlight. But, it is to be noted that no torch has been produced before the court or not even spoken to by any other witnesses about the torch. Further, as per Ext.P2 seizure mahazar, the time at which they reached at the place of incident is after 7.30 p.m and there is no evidence before the court that the police officers were able to identify the persons alleged to have been sold or possessed the contraband at the place as alleged by the prosecution. Further, the definite case of PW2 before the court was that the entire bottles of Indian made foreign liquor were transported to the police station in a tempo van and there is no evidence before the court to show that such transportation of the bottles in the tempo van has been done as stated by PW2. Though, this witness has stated that

the receipt for payment of the tempo van has been sent for his claim before the authorities, no records have been produced to prove this. Further, it is interesting to note that all the 2966 bottles of Whisky and Fenny were loaded from a distance of 800 meters from the place of occurrence to the tempo. According to PW1, it was done by the police officers themselves but, there is no evidence before the court that the entire bottles transported and loaded by the police officers as claimed by PW2. Further, it has to be noted that as per Ext.P2 mahazar, all the bottles were seized at the place itself and four bottles of samples have been taken for chemical analysis but, the forwarding note dated 4.12.2000 would show that two bottles of sample have been sent for chemical analysis. In the forwarding note, it is also to be noted that when the samples were produced before the court, a perusal of the forwarding note signed by the Sub Inspector dated 4.12.2000 would show that the Judicial Magistrate of the First Class, Kasaragod, had only initialed in that and that initial was not with any date. Seal is also put in the forwarding note. It is seen that seal of the Judicial Magistrate of First Class, Kasaragod is seen affixed on the forwarding note but, Ext.P5 would not show that either the sample or any contraband seized have been produced before the court for

verification or the Magistrate had verified the samples or the bottles so produced. In this context, evidence of PW2 would show that the contraband articles seized and the samples were produced before the court on 5.12.2001 got numbered as PR 773/2000. But, according to the prosecution, the Police Officer-PW4, who was in charge of the contraband, has stated that the contraband articles were produced before the court on 5.1.2000. Apart from the contradiction of the date of production of the contraband articles and the samples, there is no explanation either coming from PW2 or PW4 to show that the samples and the contraband articles were kept in proper custody till the same were produced before the court. In this context, judgment of this Court reported in **Narayani v. Excise Inspector** (2002 (3) KLT 725) is relevant. In the above judgment, this Court had categorically held that in the absence of any evidence to prove that the residue and the samples were kept in proper custody till the date of production of the same before the court as to who was in possession of the contraband till it was produced before the court, it is the duty of the prosecution to prove that chance of tampering with the sample taken and the residue seized to be ruled out. Further, it could be seen from the evidence adduced and on perusing the entire records of the trial

court that no thondi clerk has been examined before the court to show that the samples had sent from the court for analysis. In this context, this Court see that there is a report sent by the Sub Inspector of Police, Manjeshwar to the District Court on 4.2.2003. In that report, it is specifically stated that the contraband articles seized and the boxes in which the bottles were kept could not be produced before the court as all these were seen ruined at the thondi room of the police station itself. This report would show that none of the contraband bottles seized were produced before the trial court or even before the committal court. Further, it is to be noted that an amount of Rs.9,500/= was alleged to have been seized from the pocket of the 1st accused. These notes were produced before the Judicial Magistrate of First Class along with the samples for chemical analysis only on 2.7.2001 as it is seen that the Magistrate had initialed the said list of property along with a requisition to send the sample for analysis as per receipt No.264/2001 only on 2.7.2001. In this context, one more aspect has to be looked into. When the trial court passed the judgment, there is no whisper either about production or non-production of the bottles or even the boxes or production of the currency notes alleged to have been recovered from the 1st accused. No material

object has been marked before the court. In the above circumstances, it is very difficult to believe Pws 2 and 4 that 2,596 bottles of Whisky and Fenny were seized as alleged by the prosecution from the possession of the appellants as claimed by the prosecution. In this context, evidence of Pws 2, 4 and 5 would not show that who actually produced the contraband and the sample before the court for verification and no such witness had been examined and the officers examined were not sure about the date of production of the samples or even contraband bottles alleged to have been seized from the appellants. In this context, this Court had noticed that more than five cases in this kind have been disposed of by this Court. In all these cases, no material object has been produced either before the committal court or before the trial court for verification and there is no evidence also spoken to by any of the officers, who detected the crime regarding keeping of the contraband article or production of the same before the court in time. This is actually against the provisions of Section 53 and 53 A of the Abkari Act. Section 53 of the Abkari Act reads as follows:

53. Police to take charge of articles seized:-

> All Officers in charge of Police Stations shall take charge of and keep in safe custody pending the orders of a Magistrate or an Abkari Inspector, all articles seized under this Act which may be delivered to them and shall allow any Abkari Officer who may accompany such articles to the Police Station, or who may be deputed for the purpose by his superior officer, to affix his seal to such articles and to take samples of and from them. All samples so taken shall also be sealed with the seal of the officer in charge of the Police Station.

7. This Section deals with duty of an officer either a Police Officer or an Abkari Inspector with regard to seizure and necessity of preparation of inventory regarding materials searched or seized from any person or from any building and necessity of taking samples by such officers as per the said section. In this context, it is also to be noted that though PW2 had stated that he had labeled and sealed the samples of four bottles but, it is seen that only two bottles were produced before the court and analysed as per Ext.P6 chemical report. If so, it is a common phenomenon seen in abkari cases were either excise officials or police officers, who were detect the offences under the Abkari Act, are not properly adhering with the provisions of the Act. Further, Section 53 A reads as follows:

> 53A. Disposal of seized liquor, intoxicating drugs or articles:- (1) Notwithstanding anything

contained in this Act, the State Government may having regard to the nature of the liquor, intoxicating drug or article, its vulnerability to theft, substitution, constraints of proper storage space or any other relevant consideration, by notification in the official Gazette, specify such liquor intoxicating drug or article which shall, as soon as may be after its seizure, be disposed of by the authorised officer referred to in section 67 B, in such manner as the Government may, from time to time determine after following the procedure hereinafter specified.

(2). Where any such notified liquor, intoxicating drug or article has been seized under this Act, the authorised officer shall prepare an inventory of such liquor, intoxicating drug or article containing such details relating to their description, quality, quantity, mode of packing, marks, numbers of such other identifying particulars of the liquor, intoxicating drug or article or the packing containers in which they are kept, place or origin and other particulars, as the authorised officer may consider relevant to identify the liquor, intoxicating drug or article in any proceedings under this Act and make an application to any Magistrate having jurisdiction over the area where the seized liquor, intoxicating drug or articles are stored for the purpose of -

(a) certifying the correctness of the inventory so prepared ; or

(b) taking, in the presence of such Magistrate, photographs of such liquor, intoxicating drug or article and certifying such photographs as true; or

(c) allowing to draw representative samples of such liquor, intoxicating drug or article in the presence of such Magistrate and certifying the

correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2) the Magistrate shall, as soon as may be, visit the place where such liquor, intoxicating drug or articles are stored and take appropriate steps as specified in clauses (a), (b) and (c) of sub-section (2), and allow the application.

(4) Where any liquor or intoxicating drug or article under this Act has been kept under the custody of any court in connection with any officer committed under this Act, before the commencement of the Abkari (Amendment) Act, 2003 or has been brought before a Magistrate without complying the procedure laid down in sub-section (2), the authorised officer shall obtain prior permission of the Court or Magistrate before initiating proceedings under sub-section (2).

(5) Notwithstanding anything contained in the Indian Evidence Act, 1872 (Central Act 1 of 1872) or the Code of Criminal Procedure, 1973 (Central Act 2 of 1974) , any Court trying an offence under this Act, shall treat the inventory, the photographs of liquor, intoxicating drug or article and any list of samples drawn under sub-section (2) and (4) and certified by the magistrate, as primary evidence in respect of such offence.

Explanation: 'Article" for the purpose of this section includes jaggery and other like substances, the value of which depreciates in passage of time

8. A reading of this Sections would show that an excise official or a police officer who detects offences under the provisions of the Abkari Act is under the bounden duty to follow these mandatory

provisions of the Act. Apart from this, Kerala Excise Manual Volume-II Chapter XXV prescribes special procedures for detection of the crime, enquiry, trials and prevention of excise offences. In the above Chapter, paragraph 45 of the Manual deals with custody of the articles seized and the duty casts on the police officials and the excise officials with regard to keeping, custody and production of the same before the court in time. Paragraphs 45 and 46 of the manual, which are quoted below, read as follows:

> "45. Custody by police of persons and articles and follow up action:- The Police Department will co-operate with the Excise Department in regard to taking charge of all articles seized and also as to the requirements of Excise Act. Station House Officers will either forward in custody to Excise Inspectors all persons arrested and brought to them for breaches of the Excise laws or admit them to bail to appear before the Excise Inspector. In the former case, the occurrence and other reports and two out of the three samples of the liquor, etc if any, received by the Police Station House Officer with the persons arrested will be sent to the Excise Inspector; in the latter case the bail bond together with the occurrence reports (and samples if any which should be sealed by the Station House Offices) will be handed over to the officer of the Excise Department making the report, for transmission to the Inspector.
>
> 46. The following instructions will be observed by the Police Department in the matter of

> receiving prisoners charged by this Department with an offence under the Excise laws and taken for confinement in a Police lock-up en route to the court to which they are sent under custody.
>
> (i) When a prisoner escorted by officers of the Excise Department is brought for confinement in a Police lock-up, the responsible Police Officer shall take charge of the prisoner from the Excise Officer in charge of the escort and be responsible for the prisoner's safe custody while in police lock-up.
>
> (ii) In all circumstances the duty of supplying the prisoner with food and guarding him when outside the lock-up shall be with the Excise Officers."

9. From a reading of the above provision also, it would reveal that, it is the duty of the Excise Officer or the Police Officer to deal with the article seized, keeping of the same and production of the same before the court in time. Paragraphs 36 to 44 of the Manual deal with the procedure to be followed when a person is arrested on acquisition of an offence committed under the provisions of the Abkari Act. But, in most of the cases, these procedures are not followed either by the Police Officers or by the Excise officers. In this context, it is also to be noted that as per Ext.P2 mahazr prepared by PW2, 2,976 bottles of Indian made foreign liquors were alleged to have been seized but, no evidence either by way of a

photograph or by way of an inventory with details of the contraband article has been produced before the court. This is also in violation of the procedure prescribed under the provisions of the Abkari Act and the Kerala Excise Manual. In this context, an earlier judgment of this Court reported in in **Dominic v. State of Kerala** (1989 KLT 601) is also relevant to be noted and in spite of the above judgment and the statutory provisions of the Abkari Act and the Kerala Excise Manual, the Excise Officials and the Police Officials are not following the procedure prescribed for this purpose. One more aspect to be noted is that though the trial court requested from the detecting officer to show the evidence regarding seizure of the bottles, as per Ext.P3 FIR it is stated that the appellants were keeping Indian made foreign liquor as imported from Karnataka for sale and an amount of Rs.9,500/= were also seized from the pocket of the 1st accused, no evidence has been adduced before the court. Further prosecution allegation is that entire contraband article alleged to have been seized were imported, transported and possessed by the appellants from Karnataka and no attempt is also made to prove that fact. Apart from that, as per Ext.P1 certificate given by PW1, the property from where the alleged seizure has been made belongs to a private person namely A.K. Khalid, S/o. K.A.

Abdul Rahiman, Pulikunnu, Kasaragod and the place is a bushy place a forest like area. But the owner of this property stands neither questioned nor examined before the court. Further in Ext.P3 mahazar it is stated that the person who left the place at the time of occurrence as stated by the 1st accused is Sudharakara Shetty, S/o. Narayana Shetty, 22 years, Kulavayal. Ext.D1 ration card produced by the 2nd accused would show that his house name is different one and his age is not 22. It is also to be noted that the 2nd accused was not arrested but, he appeared before the court on getting summons on 7.4.2001 and no attempt was made by the police to arrest him. In this context, the case set by the appellants under Section 313 assumes relevant. The specific case set up by the appellants in their Section 313 is that the case is foisted against them on the instigation of one Francis Tellies, who had given an amount of Rs.10,000/= to the police and with that amount and with some abandoned bottles of Boss Whisky, the case has been registered and foisted against the appellants. The case of the appellants has not been properly considered by the trial court and in the above circumstances, this Court is of the view that evidence of Pws 2, 4 and 5 would not prove that any of the contraband bottles were seized from the appellants as alleged by the prosecution and

the finding of the trial court against the appellants that they have committed an offence punishable under Section 55(a) of the Act is not on any legally acceptable evidence. Hence, the judgment under challenge is set aside and the appellants are found not guilty of any offence . They are acquitted of all the charges and the appeals are allowed accordingly. It is made clear that, if any amount has been deposited by the appellants, that shall be released to them. The bail bonds executed by the appellants shall stand cancelled. The Registry shall sent a copy of this judgment to the Excise Commissioner at Trivandrum and the Director General of Police, Trivandrum and also the Director General of Prosecutions, High Court of Kerala.

The judgment of the trial court also does not show what had happened to the alleged amount which has been produced before the court? Whether the same is confiscated to the State or is kept in the court.

K. THANKAPPAN, JUDGE.

cl

K. THANKAPPAN, J.

CRL.A.NOS.811 & 812/2003

JUDGMENT

11th October, 2007.